No. 81-2159

Office Supreme Court, U.S.
FILED
APR 25 1983
ALEXANDER STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,

Appellant,

v.

THE KERR-McGEE CORPORATION, a Delaware Corporation, and THE KERR-McGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF ARIZONA, CONNECTICUT, HAWAII, LOUISIANA, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, VERMONT, WISCONSIN AND WYOMING IN SUPPORT OF APPELLANT

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Question Presented

Whether the operator of a nuclear facility that causes personal injury to an individual, through oppressive or malicious mishandling of plutonium, is exempt from a punitive damage award authorized under State law.

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Interests of *Amici*

This brief is filed by several States, pursuant to Rule 36 of the Rules of this Court, in support of Appellant's position that a State law authorizing punitive damages against a company that causes injury through its oppressive or malicious conduct is not preempted by Federal law when

applied to a company handling plutonium. Virtually all *amici*, by statute or common law, authorize the awarding of punitive damages against a party that causes injury through its oppressive or malicious conduct—regardless of the industry in which defendant operates. *Amici*, therefore, urge this Court to reverse the ruling below, in *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981), that such damages are preempted when awarded against a company holding a license from the U.S. Nuclear Regulatory Commission ("NRC").

The Court of Appeals ruling failed to give the proper presumption of validity to State law, and impermissibly interfered with the paramount interests of each State in fashioning appropriate remedies for tortious conduct that produces injury within the State. Moreover, the decision below created an entirely new and erroneous standard for resolving presumption questions. The Court of Appeals held that the State law was preempted even though it created no conflict with Federal law, and even though it did not stand as an obstacle to Congressional policy. The Court reasoned that the State law "competes substantially" with Federal regulation, 667 F.2d at 923, because it seeks to accomplish objectives similar to the Federal scheme. Unless reversed by this Court, this new standard could bring into question many proper State laws enacted under the police power in other substantive areas that seek to promote the health, safety and welfare of State residents. In addition, the decision below carves out an exception from State tort law of general applicability in favor of a single industry, the nuclear industry, although Congress has never decreed that this industry should be exempt. Moreover,

the decision artificially divides the package of State tort remedies into compensatory and punitive elements, holding the latter to be preempted, whereas neither this Court nor Congress has authorized such a splitting of the remedies available to a victim under State tort law. In addition, the ruling incorrectly concludes that punitive damages are the equivalent of regulation, whereas they also serve as an additional means for compensating the injured party.

Statement of the Case

This action was initiated by the representative of the Estate of Karen G. Silkwood (hereinafter "Silkwood" or plaintiff), for personal injury and property damages suffered when Silkwood was contaminated with plutonium in November 1974. The parties stipulated below that the plutonium which caused the contamination came from the plant of defendant Kerr-McGee Corporation, by whom Silkwood was then employed. See the decision below, 667 F.2d at 913, 921. The plant, located in Oklahoma, fabricated fuel pins containing plutonium for use in commercial nuclear reactors.

The jury, finding that defendant had acted in an oppressive or malicious manner in allowing the plutonium to get out of the plant, awarded punitive damages of $10 million in addition to damages for personal injury and property loss. The jury verdict was upheld by the District Court, *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566 (W.D. Okla. 1979), but as previously noted the Court of Appeals reversed portions of the judgment, holding that the statute authorizing punitive damages was preempted as applied to a nuclear facility.

The statute under which punitive damages were awarded is an Oklahoma law of general application, 23 Okla. Stat. §9. The section provides:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

In upholding the jury award, the District Court noted that the liability depended on the fact that defendant had permitted the plutonium to escape from its facility and to contaminate Silkwood and her apartment. The Court held that the jury was entitled to award punitive damages for oppressive or malicious conduct by Kerr-McGee. The Court noted that there was evidence of Kerr-McGee's failure to handle the plutonium properly:

> . . . One plaintiff's witness, Dr. Morgon, offered his opinion that if rated or graded for their operation of the Cimarron facility, defendants should receive an "F" or failing grade. One defense witness, a regional director of the NRC, himself stated that the facility would in his judgment receive a "C." . . .

485 F. Supp. at 586. The Court also said:

> Plaintiff's evidence established substantial, credible evidence of poor training, poor security, workers who knew of a variety of ways to remove large amounts of plutonium from the facility without detection, workers indifferent to the hazards of plutonium, and much more, all of which tended to establish the propriety of a punitive award. There was conflicting evidence, how-

> ever subject to credibility tests, of an uninformed or indifferent management . . .

Id. at 591.

The Court noted the hazards that were posed by the escape of plutonium from the facility, saying:

> . . . A Kerr-McGee witness characterized the implications of this [escape of] 1 pound of plutonium in the public domain as "sheer havoc and death." Even the potentially very grave dangers of one half gram of plutonium in the public domain were agreed upon by virtually all witnesses . . .

Id. at 576.* The Court concluded that punitive damages could be awarded by the jury if Kerr-McGee knew of the escape of plutonium from the facility, or knew that its employees repeatedly were being exposed to plutonium, but did nothing to remedy the situation. *Id.* at 584.

In reversing the award of punitive damages, the Court of Appeals held that Federal regulations preempted. It said that the NRC had exclusive jurisdiction to regulate radiation hazards associated with nuclear energy, and that the punitive damage award "competes substa[illegible]ally" with such regulation. *Id.* at 923. The Court of Appeals recognized the hazards of plutonium, saying:

> It is acknowledged, however, that plutonium is one of the most carcinogenic and dangerous substances known.

667 F.2d at 913.

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* Plutonium is "one of the most toxic substances known to man," and "[o]ne thirty-millionth of an ounce, less than a pollen grain, will cause cancer if inhaled or swallowed." Senate Report 93-980, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Ad. News at 5471 n.1.

Circuit Judge Doyle dissented, saying that Federal preemption of an entire field should not be presumed. *Id.* at 927. Thus, he said, even assuming that Congress preempted State *regulation* of radiation hazards, it would not follow that a general statute authorizing punitive damage awards in lawsuits between private parties would be preempted. *Id.* at 927, 929.

The only issue before this Court is whether the punitive damage statute was preempted. Other conceivable grounds for challenging the judgment—such as possible excessiveness—were not considered by the Court of Appeals, and are not ripe for review at this time. Similarly, the question of whether Kerr-McGee was in substantial compliance with NRC regulations and, if so, whether it was therefore not subject to punitive damages, was not considered by the decision below. 667 F.2d at 923. Moreover, for purposes of this appeal the Court must accept the jury's conclusion that Kerr-McGee's conduct was oppressive and/or malicious, and therefore that punitive damages were appropriate under the statute. That factual conclusion was not rejected by the Court of Appeals, and may not be relitigated in this Court.

Summary of Argument

A State law of general application authorizing punitive damages for malicious mishandling of highly toxic material does not conflict with the objectives of Congress. To the contrary, it parallels the Congressional purpose that the materials be handled with care. In addition, Congress has never said that a State punitive damage provision should be preempted, nor does the State law conflict with either

the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, or the Price-Anderson Act, 42 U.S.C. § 2210. While nuclear plants are subject to extensive Federal regulation, and certain State regulations might be challenged on preemption grounds, State tort laws of general application—including punitive damage provisions—continue to govern. Moreover, the validity of punitive damages has been recognized in other fields subject to extensive Federal regulation. Punitive damages serve as additional compensation for victims of malicious wrongdoing, and therefore should not be treated differently from compensatory damages. In view of the above, and the strong presumption against finding a State law preempted, the decision below on punitive damages is incorrect.

ARGUMENT

The Oklahoma Punitive Damage Statute Does Not Conflict With Federal Law or Objectives, Nor Has Congress Expressed an Intent That Such a Law Be Preempted.

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Court said:

> we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.

(Emphasis added). Justice Rehnquist explained the democratic underpinning of this principle as follows:

> This assumption derives from our basic constitutional division of legislative competence between the States

> and Congress; from "due regard for the presuppositions of our embracing federal system, *including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy* . . . ." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959) (emphasis added).

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (dissent).

In the absence of a clear and manifest purpose of Congress to preempt, a State provision will not be preempted unless the Act of Congress "is in actual conflict with the law of the State," *Savage* v. *Jones*, 225 U.S. 501, 533 (1912), or unless the State provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

In the case at bar, Congress has not expressed a clear and manifest purpose to preempt a punitive damage statute of general application. To the contrary, it has expressed its intent of relying on State tort law for events such as occurred here, and has not excluded punitive damages. Moreover, the State statute is not in actual conflict with Federal law, and it does not stand as an obstacle to accomplishing the objectives of Congress. Indeed, the Federal scheme and State tort law of general application have compatible objectives—preventing NRC licensees from handling hazardous materials in an oppressive and malicious manner that can cause injury—and licensees that avoid such culpable conduct are not thereby violating Federal law.

A. There Is No Actual Conflict Between the State Punitive Damage Provision and the Objectives of Congress.

This is not a "square conflict" case where "compliance with both Federal and State regulations is a physical impossibility" or where there is an "inevitable collision between the two schemes." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). To the contrary, Kerr-McGee can easily avoid punitive damages simply by handling plutonium in a manner that is not oppressive or malicious. NRC regulations, of course, do not mandate that Kerr-McGee be reckless in handling plutonium. To the contrary, those regulations require that defendant

> make every reasonable effort to maintain radiation exposures . . . *as low as is reasonably achievable* . . . .

10 CFR § 20.1(c). The award of punitive damages for recklessness in handling plutonium is entirely consistent with the NRC requirement.

Similarly, a central purpose of the Atomic Energy Act and NRC regulations is protection of the public health and safety from radiation hazards. 42 U.S.C. § 2012(e). Oklahoma's general punitive damage statute, as applied in particular cases, could parallel the safety purpose enunciated by Congress. The imposition of punitive damages in the extraordinary case of a company found to have handled a highly toxic, radioactive substance in a malicious manner so as to cause actual contamination to an individual is in complete harmony with the Congressional purpose of discouraging such reckless conduct.

Even if it be assumed that Congress wants to encourage the development of nuclear power, which *amici* do not concede,* Congress wants that only so long as there is protection of "the health and safety of the public." 42 U.S.C. § 2012(d). *See also* 42 U.S.C. § 2013(d) (development of atomic energy "to the maximum extent consistent with . . . the health and safety of the public"). Clearly, Congress did not want to encourage reckless handling of plutonium that would imperil public health, or to exempt from State law NRC licensees that engage in such reckless conduct. It should be very, very rare that such egregious conduct would occur; indeed, this is evidently the first case in which punitive damages have been awarded against an NRC licensee. One such award in over 25 years of commercial nuclear power can hardly be considered a serious threat to the multi-billion-dollar nuclear industry. It does no more than remind the industry that it must avoid outrageous conduct.

B. The Atomic Energy Act Does Not Bar Application of a Punitive Damage Provision for the Injury Suffered by Silkwood.

The Court of Appeals was incorrect in concluding that the regulations issued under the Atomic Energy Act preempt punitive damages. Nothing in that Act, or the NRC regulations, requires such preemption. It was acknowl-

* Many States have recently presented to this Court the argument that Congress does not wish to promote nuclear power over other forms of energy or over the conservation of energy, and has in fact deemphasized nuclear power in legislation over the past decade—giving greater emphases to coal, hydropower, solar and other forms of renewable energy, and conservation. See, *e.g.*, Brief *Amicus Curiae* of twelve States in Support of Jurisdictional Statement filed in this case on July 17, 1982, at 13-19. For purposes of brevity, that argument will not be repeated here.

edged below that compensatory damages could be awarded to Silkwood under State law, and there is no basis for excepting punitive damages.

Despite the absence of conflict between the objectives of the Federal and State laws, the Court of Appeals found preemption because of the novel reason that the punitive damage provision "competes substantially" with the NRC regulations. 667 F.2d at 923. This is not the test for preemption, however. See pp. 7-8, above. Moreover, the Oklahoma statute does not truly compete with NRC regulations, and is not a regulatory statute. The focus of the two laws is different. While the NRC regulations issued under the Atomic Energy Act require companies to exercise care to keep exposures "as low as is reasonably achievable" (see p. 9, above), they do not create a cause of action for victims if contamination does occur. Indeed, the Act does not create a private cause of action of any kind. *Susquehanna Valley Alliance* v. *Three Mile Island*, 619 F.2d 231, 237-9 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). The State provision, by contrast, does not regulate conduct but does provide a remedy for victims of accidents.

The Court of Appeals' reliance on *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972), is misplaced. That case held only that a State could not regulate the discharge of liquid effluents from an operating nuclear power plant because the NRC regulates that precise subject, and its regulations preempt. This Court's summary affirmance in that case is of very limited precedential value, because the issues were not fully briefed and argued. *See Edelman* v. *Jordan*,

415 U.S. 651, 670-71 (1974). Moreover, the summary affirmance did not indicate Court approval of the Circuit Court's reasoning. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). In any event, *Northern States* is easily distinguishable, because it barred only State *regulation* aimed specifically at nuclear plants, not tort rules of general application.

The Court of Appeals relied also on *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976). That case held that the NRC, rather than the U.S. Environmental Protection Agency, had power to set discharge limits for nuclear waste materials regulated by the NRC. Thus, the case dealt with regulation of operating nuclear facilities, rather than tort law of general application. Similarly, *United States* v. *City of New York*, 463 F. Supp. 604 (S.D.N.Y. 1978), struck down local regulation of a nuclear facility. These cases are not relevant here, since no State regulatory scheme is involved.

The Court of Appeals, however, said that a punitive damage award "is no less intrusive" than direct State regulation. 667 F.2d at 923. This is erroneous. State regulation would seek to control the day-to-day conduct of Kerr-McGee, and could duplicate NRC regulations. In addition, it could subject the company to State inspections and fines on a daily basis whether or not injury occurs, and whether or not the violation is due to recklessness rather than mere negligence. By contrast, the punitive damage award does not come into play until after someone is injured, and only if the injury is caused by oppressive or malicious misconduct. The award would deter only such outrageous conduct. Otherwise the punitive damage provision plays no role in the day-to-day operations of Kerr-McGee. Moreover, to

"regulate" an activity is to "prescribe the rule by which [the activity] shall be governed." *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895); *Accord, U.S.* v. *Darby*, 312 U.S. 100, 113 (1941). *See also Federal Power Comm.* v. *Corporation Comm. of State of Okla.*, 362 F. Supp. 522, 532 (W.D. Okla. 1973), *aff'd mem.* 415 U.S. 961 (1974) (to regulate is to "lay down the rule by which a thing shall be done"). By contrast, while a punitive damage award may seek to deter malicious wrongdoing, it does not prescribe rules of conduct.

An award of punitive damages, while it seeks to punish the defendant and deter wrongful conduct, has a strong compensatory effect as well. It compensates the plaintiff for the trouble, inconvenience and expense of litigation. Thus, punitive damages are a supplement to compensatory damages for cases of malicious wrongdoing. Many courts have held that punitive damages

> have an additional purpose in compensating the plaintiff for those additional elements of damage which were a consequence of the aggravated nature of the offense, or which are so intangible that they are not covered by the ordinary compensatory award, or which, although a normal consequence of the wrong, are not normally allowed as compensation because of policy reasons.
>
> Since the allowance for "costs" under the rules adopted in most American jurisdictions is commonly known to be highly inadequate to reimburse a successful party for the expenses of litigation, particularly since attorneys' fees are not usually allowed, it has been suggested from time to time that where punitive damages are awarded, a proper measure or element of such damages would be the litigation expenses, particu-

> larly attorneys' fees, which plaintiff incurred as a result of defendant's acts.

J. L. Litwin, "Attorneys' Fees Or Other Expenses Of Litigation As Elements In Measuring Exemplary Or Punitive Damages," 30 ALR 3d 1443, 1445-6 (footnotes omitted). That annotation identifies dozens of cases that permit plaintiff to recover litigation costs as part of punitive damages. *Id.* at 1448-1455, and pocket part at 246-7. As one Court has said, with respect to the amount of punitive damages:

> One factor mentioned by the Supreme Court, as a guide rather than a definition, is the provision of costs of litigation actually incurred but not included within costs taxable to the ordinary victor, Day v. Woodworth, *supra*, 54 U.S. at 371. The significant element of course is counsel fees.

Afro-American Publishing Co. v. *Jaffe*, 366 F. 2d 649, 662 (D.C. Cir. 1966) (*en banc*) (footnote omitted). *See also Payne* v. *Government of District of Columbia*, 559 F. 2d 809, 821-2 (D.C. Cir. 1977) (opinion of Circuit Judge Robinson) (punitive damages "may include counsel fees and other costs"). That punitive damages compensate plaintiff for costs of litigation and attorneys' fees has also been recognized in *Campus Sweater & Sportswear* v. *M.B. Kahn Const.*, 515 F. Supp. 64, 105 (D. S.C. 1979), *aff'd*, 644 F. 2d 877 (4th Cir. 1981), and *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437, 454 (1980).

Punitive damages also compensate plaintiff for "the enormous diligence, imagination, and financial outlay required . . . to uncover and to prove the flagrant misconduct" by defendant. *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 812, 174 Cal. Rptr. 348, 384 (1981).

In addition, punitive damages compensate plaintiff for the "humiliation, sense of outrage, and indignity . . . [and] the harm done the plaintiff's feelings." *Kewin* v. *Massachusetts Mutual Life Insurance Co.*, 295 N.W. 2d 50, 55 (Mich. Sup. Ct. 1980), citing *McFadden* v. *Tate*, 350 Mich. 84, 89, 85 N.W. 2d 181 (1957). As a commentator has said:

> Even today the law for various reasons does not fully protect emotional tranquillity through compensatory damages; requiring defendants guilty of flagrant misconduct to make full compensation for such injuries helps to fill this void. When one person is injured by the malicious actions of another, "the human spirit is bruised by the knowledge of another's ill-will or contempt . . . ." The legal revenge provided by punitive damages helps restore the plaintiff's emotional equilibrium and in this way compensates him for the psychological harm caused by the defendant's malicious act.

Owen, "Punitive Damages In Products Liability and Litigation," 74 Mich. L. Rev. 1258, 1296 (1976) (footnote omitted). Thus, punitive damages should not have been isolated by the Court below and treated differently from compensatory damages.

Moreover, punitive damages have been permitted in other fields subject to extensive Federal regulation, despite the claim of preemption. Thus, in *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976), plaintiff was awarded $25,000 punitive damages in his common-law claim arising out of overbooking on an airline regulated by the Civil Aeronautics Board. CAB regulations covered the subject of overbooking, and defendant claimed that this regulation preempted the field. This Court rejected defendant's argu-

ment, upholding a presumption that State law rights are not abrogated by a subsequent Federal statute "unless it is found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words, render it nugatory." *Id.* at 298, quoting with approval from *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). The Court went on to say that "where Congress has sought to confer such power [to immunize from common law tort liability] it has done so expressly," 426 U.S. at 301. The Court refused to find preemption because "the common law action and the statute are not 'absolutely inconsistent' and may coexist," *id.* at 300, since "there is no [CAB] requirement that air carriers engage in overbooking." *Id.* Similarly, Silkwood's punitive damage recovery is not inconsistent with NRC regulations because the latter do not require Kerr-McGee to handle plutonium in a reckless manner.* *Accord, Hubbard* v. *Allied Van Lines, Inc.*, 540 F. 2d 1224, 1229 (4th Cir. 1976), upholding claim of punitive damages for malicious violation of Interstate Commerce Act nondiscrimination clause, 49 U.S.C. § 316(d), as "fully complementary to the congressional mandate and will help achieve compliance" with the Act.

That punitive damages may be awarded under State law despite Federal regulation is reflected as well in the field of

* While Nader's judgment for punitive damages was ultimately reversed, *Nader* v. *Allegheny Airlines, Inc.*, 626 F.2d 1031 (D.C. Cir. 1980), that is because the Court found there was no deceitful conduct by defendant. However, punitive damages were not preempted, and could have been awarded for malicious conduct. The issue of whether compliance with Federal regulations bars punitive damages was not considered by the Court below, and therefore is not before this Court. See above, p. 6.

labor law, where there is a perceived need for a national labor relations policy. In that field also this Court has preserved against preemption the application of traditional common-law remedies, including punitive damages, for tortious conduct. *See United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1950) (upholding $100,000 punitive damage award on a State tort claim for what was also an unfair labor practice), where the Court said:

> To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. . . . The primarily private nature of claims for damages under state law also distinguish them in a measure from the public nature of the regulation of future labor relations under federal law.

Id. at 665.

This preservation of State tort law despite the perceived desire for a uniform national labor policy is demonstrated by other cases as well. Thus, in *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977), this Court held that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, did not preempt a State tort action by a union member, for compensatory and punitive damages, charging the union with intentional infliction of emotional stress through abuse and harassment. The Court recognized that the action complained of might constitute an unfair labor practice under the Act, but said that "there is no federal protection" for outrageous conduct by union officials. *Id.* at 302. The Court recognized that the State "has a substantial interest

in protecting its citizens from the kind of abuse of which [plaintiff] complained," *id.*, and noted that the National Labor Relations Board ("NLRB") could not award damages to plaintiff. *Id.* at 304. Similarly, in *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958), the Court upheld the jurisdiction of a State court to award compensatory and punitive damages to an employee against a union for malicious interference with the employee's lawful occupation, by preventing him from crossing a picket line. The Court noted that the NLRB had some jurisdiction over the action and could award the plaintiff back pay but not other elements of his damages under State law. And in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court held that a libel action could be maintained under State law for malicious or reckless statements made during a labor dispute, despite NLRB jurisdiction, because the victim of the libel could not obtain redress from the NLRB. *Id.* at 63-4.

It is noteworthy that these cases upheld the application of State tort remedies in their entirety, making no exception for punitive damages. In the case at bar, similarly, there is no basis for such an exception. And, as in the cited cases, application of State tort remedies to Silkwood was appropriate because Federal law does not protect reckless mishandling of plutonium by Kerr-McGee, and States have a substantial interest in protecting their residents from such conduct. In addition, the NRC was without jurisdiction to award damages to Silkwood.

These cases prove again that the existence of comprehensive Federal regulations does not in itself establish preemption of all State regulation, let alone of a punitive dam-

age statute. As this Court said in *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973):

> We reject, to begin with, the contention that preemption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . . The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem, cf. *Askew* v. *American Waterways*, 411 U.S. 325 (1973).

Id. at 415. *See also De Canas* v. *Bica*, 424 U.S. 351, 359-60 (1976) ("comprehensiveness . . . to be expected" in immigration law; no preemption).

C. The Price-Anderson Act Does Not Bar an Award of Punitive Damages for the Injury Suffered by Silkwood.

Although the Court of Appeals did not expressly hold that the Price-Anderson Act, 42 U.S.C. § 2210, barred punitive damages in this case, it suggested that perhaps that was the result. The Court acknowledged that the Act does not claim to preempt punitive damage provisions:

> . . . the Price-Anderson Act contemplates that state tort law applies in at least some cases involving nuclear incidents; we have found that a claim for compensatory damages for off-site contamination caused by the escape of plutonium is one such situation. Nowhere in the Price-Anderson Act or its legislative history have we found express mention of punitive damages. References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive

> as well as compensatory damages in states like Oklahoma which permit them.

667 F.2d at 922. Nonetheless, the Court did not then apply the presumption against preemption, or attempt to harmonize the Federal and State laws. Rather, it concluded that for an extraordinary nuclear occurrence ["ENO"]* the Act "implicitly assumes that only compensatory damages will be awarded," *id.*, relying on this Court's statement that the Act provides compensation to victims of catastrophic nuclear accidents. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 93 (1978).

The Court's suggestion that Price-Anderson preempts is erroneous. First of all, the Silkwood incident was not an ENO, and therefore it is irrelevant whether punitive damages are permitted for an ENO. For an incident which is not an ENO, Price-Anderson requires the application of State tort law in its totality. NRC regulations under Price-Anderson say explicitly that ordinary State tort law governs a non-ENO, and that they govern even an ENO except that certain defenses are waived. The regulations provide:

> The presence or absence of an extraordinary nuclear occurrence determination does not concomitantly determine whether or not a particular claimant will recover on his claim. In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation for his injury or damage. *If there has not been an extraordinary nuclear occurrence determination, the claimant*

* An ENO is an event which results in substantial release of radioactivity away from the plant site, causing substantial damage to persons or property offsite. See 10 CFR §§ 140.81-140.85.

> *must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction.* If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant . . .

10 CFR § 140.81(b)(4) (emphasis added).

The Court of Appeals acknowledged that State law generally governs the Silkwood claim. It said:

> For nuclear incidents below the level of an extraordinary nuclear occurrence, and the instant case is one, the rules of tort law of the state in which the injury occurred still apply.
>
> > "The bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law."
>
> S. Rep. No. 1605, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3201, 3211. *See also id.* 3203-04, 3206, 3207, 3209, 3226; S. Rep. No. 296, 85th Cong., 1st Sess. *reprinted in* [1957] U.S. Code Cong. & Ad. News 1803, 1810, 1823.

667 F.2d at 921. For the Court to say that punitive damages must be treated differently from the rest of State tort law was erroneous and unsupported. Neither Congress nor this Court has drawn such a distinction between elements of the State claim.

In fact, the Price-Anderson Act scrupulously avoids language that might suggest only claims for compensatory

damages are covered by its insurance, indemnity and liability limitation provisions. Rather the Act uses broad language that can encompass punitive damages within its scope, such as "public liability claims," 42 U.S.C. § 2210(a) and *passim;* "suits for damage," *id.* (d), (e), (l); and "action," *id.* (h), (n)(2). The failure of Congress to make an exception for punitive damages, coupled with the strong presumption against preempting State law, demonstrates that punitive damages are permitted—and surely so for an event that is not an ENO.

Legislative history of the Price-Anderson Act, including the 1966 amendment, confirms that State tort law governs. Thus, in discussing the original bill as enacted in 1957, the Senate and House reports said that one of the two basic principles underlying the legislation is adherence to State tort law so long as the $560 million indemnification is not exceeded:

> The basic principles underlying the bill are two:
>
> 1. Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available.
>
> 2. • • •

S. Rep. 296, 85th Cong., 1st Sess. 9, H. Rep. 435, 85th Cong., 1st Sess. 9, reprinted in [1957] U.S. Code Cong. & Ad. News 1803, 1810.

In 1966, Congress amended the Price-Anderson Act to add § 2210(n), under which the operator of the nuclear

facility waives certain defenses in the event of an ENO. Pub. L. 89-645, ¶3. In enacting that provision, Congress specifically declined to enact a Federal substantive law to govern the claims, choosing to continue reliance upon State law—but barring defendants in case of an ENO from raising certain defenses otherwise available under State law. As the Senate Report said:

> Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability feature of the act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity.
>
> • • •
>
> . . . However, the committee does not believe it is necessary to go to the length of enacting substantive law—that is, a new body of Federal tort law to achieve these ends. Essentially the same result, it is believed, can be accomplished through a Federal statute authorizing the Atomic Energy Commission to require that participants in the nuclear industry waive certain key defenses to liability that might otherwise be permissible under applicable State or Federal law.
>
> • • •
>
> This approach to the problems discussed above is in keeping with the approach followed in enacting the original Price-Anderson Act—namely, interfering with State law to the minimum extent necessary. In essence,

> *the plan adopted permits the retention of State law with respect to the cause of action and the measure of damages,* but the requirements specified for the insurance contracts and indemnity agreements provide the uniform rules needed to accomplish the bill's objectives . . .

Sen. Rep. No. 1605, and H.R. Rep. No. 2043, 89th Cong., 2d Sess. 6, 9 (1966), reprinted in [1966] U.S. Code Cong. & Ad. News 3201, 3206, 3209 (emphasis added). Thus, the measure of damages available under State law—including punitive damages—would apply up to the limit of $560 million.

In addition, Congress clearly intended that for an event less severe than an ENO—such as the Silkwood injury—the entire array of State remedies would continue to be available:

> . . . the committee is of the opinion, on balance, that there is no pressing need to invoke the mechanisms and procedures of the special waivers in situations which are not exceptional and which can well be taken care of by the traditional system of tort law. Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device or nuclear materials, traditional concepts should be allowed to prevail . . .

Sen. Rep. No. 1605, *supra,* and H.R. No. 2043, *supra,* 11, [1966] U.S. Code Cong. & Ad. News at 3211. Similarly, Representative Price explained this concept as follows:

> The definition of "extraordinary nuclear occurrence" has been drafted so that minor claims involving nuclear facilities will remain subject to *all the traditional rules of tort law.*

112 Cong. Rec. H. 14012 (1966) (emphasis added). Throughout the Congressional discussion there was no suggestion

that punitive damages were being excluded from the package of remedies available under State tort law. As the Solicitor General notes, the issue of punitive damages was put before Congress by Professor David Cavers, who raised the question of whether they should be allowed under Price-Anderson. Solicitor General's *amicus* brief with respect to the Jurisdictional Statement filed in November 1982, at 15-16 n. 19. The failure of Congress to exclude punitive damages indicates that they continue to be permitted where authorized under State law.

Finally, Price-Anderson cannot bar the punitive damage award here because the Act did not even apply to the Kerr-McGee plant at the time of the Silkwood contamination. As the Solicitor General says, the NRC did not extend the provisions of the Act to such plants "until after the events giving rise to this case." See Brief for the United States as *Amicus Curiae* filed in November 1982 opposing the Jurisdictional Statement at 15, n. 18.

Conclusion

This Court should make every effort to reconcile the Oklahoma and Federal provisions " 'rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (1973), quoting from *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). Here, reconciliation of the two schemes is simple enough, as there is no conflict in the objectives of the statutes and no inconsistency in their terms.

The Court of Appeals' decision overturning the award of punitive damages on grounds of Federal preemption should be reversed.

Dated: April 1983

Respectfully submitted,

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